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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DANNY LASHAWN HAMPTON, Defendant and Appellant.	C056867 (Super. Ct. Nos. 04F11184, 03F04807, 04F07097)

A jury convicted defendant Danny Lashawn Hampton of first degree murder (count one; Pen. Code, § 187)[1] and robbery (counts two & three; § 211). The jury also found true that the murder was committed in the commission of robbery, that the robberies were committed in concert in an inhabited dwelling house, and that a principal was armed with a firearm as to all

[1] Hereafter, undesignated statutory references are to the Penal Code.

counts.[2] Defendant was sentenced to a state prison term of 33 years to life.[3]

Defendant contends: (1) the trial court committed reversible *Batson/Wheeler*[4] error; (2) the finding that defendant committed the robbery in count three in concert with others should be reversed for insufficient evidence that defendant perpetrated or aided and abetted the robbery; (3) the $20 crime prevention fee imposed by the trial court should be reduced to $10; and (4) clerical errors in the abstract of judgment should be corrected.

We shall remand for further proceedings as to defendant's last two contentions. In all other respects, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant and codefendants formed and carried out a plan to rob defendant's marijuana dealer, Larry Elliott, on the night of December 9, 2004. Knowing that Elliott did business out of the attached garage of his house, they intended to perpetrate the crime there. Before they left Elliott's house that night, he had not only been robbed but fatally shot in the garage; his

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[2] Camitt Doughton, Edward Quintanilla, and Deandre Scott were charged virtually identically to defendant, but were not tried in this proceeding. When we discuss the actions of the group, including defendant Hampton, we shall refer to them collectively as the defendants.

[3] This term included concurrent sentences on two trailing probation violation cases (case Nos. 03F04807 & 04F07097).

[4] *Batson v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69] (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

girlfriend, H.M., was robbed inside the house. The evidence tended to show that defendant did not personally perpetrate either the murder of Elliott or the robbery of H.M.

Defendant did not testify at trial. He gave his version of events in a taped interview with police, which was played for the jury.

Defendant's Account

Codefendants Quintanilla and Scott, who knew defendant, saw him and his girlfriend getting a ride home from Elliott. Knowing that Elliott sold marijuana, they followed Elliott to defendant's house, then to Elliott's house, then they returned to defendant's house, where codefendant Doughton was present. The four men discussed robbing Elliott. Defendant originally said he did not want to be a part of it, but the others told him that since he had heard the conversation, he had no choice. Defendant was to buy an ounce of marijuana from Elliott as a pretext to scout out how much he had at his house; as defendant understood it, that would end his involvement, and the others would do the robbery another night. Defendant called Elliott and set up the pretext buy. Quintanilla and Scott changed into black clothing.

Defendant and Doughton walked over to Elliott's house.[5] Defendant and Doughton went into Elliott's garage, where Elliott

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[5] Quintanilla's girlfriend, K.T., testified that she drove Quintanilla to a park near Elliott's house; Scott, with defendant and Doughton, pulled up alongside. Defendant said he would call Elliott and then call the others if Elliott was home.

offered defendant a sample of marijuana. Two guests of Elliott, James Willis (whom defendant knew) and George Porter, were also in the garage.

Quintanilla and Scott, dressed in black clothes and ski masks, burst in. Quintanilla had a gun and gave defendant another. Quintanilla ordered Elliott and his guests onto the ground and told defendant to turn on the radio. Quintanilla then took his gun and hit Elliott in the forehead. Defendant directed Willis to turn on the radio.

Elliott claimed he did not have money or additional marijuana, but the robbers found more marijuana in a bucket in the garage. After telling defendant to look for more "stuff," Quintanilla and Scott went into the house. Scott came back into the garage holding a shotgun and an assault rifle.

Defendant left the garage, holding the bucket, followed by Quintanilla. Then he heard a gunshot from the garage. The robbers drove to Quintanilla's house, where defendant took some marijuana; Quintanilla and Scott kept the money and guns.

Willis's Testimony

Willis testified that he was with Elliott, his dealer, from early in the evening; Porter showed up later. Willis and Elliott went into the house to watch videos with H.M. and her baby. After bagging some marijuana, Elliott, Willis, and Porter

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Several minutes later, Quintanella got the call and he and Scott left. Fifteen or 20 minutes after that, they all ran back to the car.

went into the garage, where they hung out, drank beer, and smoked marijuana.

Defendant called, saying he wanted to "buy some weed"; Willis wanted to know if they could drop it off to defendant, but defendant insisted on coming to Elliott's house. Soon after, defendant and Doughton showed up and Elliott gave them a sample. Then men in black masks arrived and put guns to the heads of Elliott, Willis, and Porter. Defendant told Willis not to worry.

Someone kept asking Elliott where the money was and pistol-whipped him when he said he did not have any. Others kept running in and out of the garage. Fifteen minutes later, Doughton shot Elliott in the back of the head and the robbers left.

H.M.'s Testimony

H.M. testified that early in the evening everyone was watching a movie in the house. After the men went to the garage, she fell asleep, woke up and resumed watching the movie, then fell asleep again on the living room couch.

Hearing the door open, H.M. awoke to find someone pointing a gun at her head and ordering her to the ground. The person went back and forth from the garage to the living room, covering his face with the hood of his sweatshirt as he asked H.M. where the money was; another man went into the bedroom. H.M. gave the first man $140 out of her purse. Later, she heard someone in the garage say: "If somebody doesn't tell me where it is,

somebody's going to get popped." Elliott answered that he didn't have anything.

Closing Arguments

The prosecutor argued that defendant was liable for the murder and robbery of Elliott as an aider and abettor, and for the robbery of H.M. as the natural and probable consequence of the plan to do a home invasion robbery: the defendants intended from the start to "make a clean sweep" by going inside the house, and anyone there would inevitably be robbed. Defendant was also guilty of robbery in concert because the defendants together committed or aided and abetted robberies in an inhabited dwelling house; merely entering the attached garage was enough for in-concert liability as to both robberies.

Defense counsel argued that defendant, "a 20-year-old kid," got trapped by the older and more hardened codefendants into going along as they committed their planned crime. He never intended to aid and abet robbery. He did not take any active part in the robbery of Elliott. He did not go into the house to rob H.M., and it was not a natural and probable consequence of anything he did, intended, or agreed to do: he did not know and could not have foreseen that H.M. would be there, let alone that she would be robbed. He was guilty only as an accessory for having taken already stolen marijuana.

The prosecutor retorted that, if under all the circumstances, a reasonable person in defendant's position would have known that the robbery of H.M. was a natural and

probable consequence of the original robbery, then defendant was liable for robbing H.M. regardless of what he actually knew.

DISCUSSION

I.

Defendant, who is Black, contends the trial court committed *Batson/Wheeler* error by finding no prima facie case of discrimination after the prosecutor peremptorily challenged B., the only Black male then on the jury panel; he also contends the removal of B. was discriminatory.[6] No reversible error occurred.

Background

Prior to voir dire, the prospective jurors filled out questionnaires which are not in the record on appeal.[7]

The trial court asked the jury panel a series of questions. The court asked whether they knew of anything that might affect their ability to be fair as jurors; B. answered that his car had been stolen five years ago. The court queried if they knew any victims of crime or violent assault; B. answered that a friend had been jumped and beaten 15 years ago. The court inquired if they knew anyone who had been charged with or convicted of a crime; B. answered that a year and half ago a friend had shaken

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[6] Two Black females were later selected to serve on the jury.

[7] In response to defendant's request to augment the record with B's completed questionnaire, the superior court clerk declared that it could not be located. Appellate counsel states that he was told the superior court does not retain jury questionnaires.

his infant son to death--B. "kind of stopped supporting him" after that.

When the trial court defined aiding and abetting and asked if anyone had a problem with it, B. responded: "What if they just happen to be there?" No other prospective juror spoke up.

Questioned by the prosecutor, B. said he had never been married and had no children. He was studying full-time to be a chef. He had not seen the friend who had shaken his baby since the night it happened.

Apparently based on B.'s questionnaire, the prosecutor asked B. whether he knew a number of people who had been arrested. He answered: "I live in Elk Grove, it seemed like everyone just started drinking. I don't drink." The prosecutor followed up: "What were you referring to? Driving under the influence?" B. answered: "*Yes, street racing, that kind go hand in hand* [*sic.*]." (Italics added.) He felt that those people had been treated fairly.

The prosecutor thereafter excused B. Defense counsel requested a sidebar, which was not reported.

After the jury was recessed, the trial court invited defense counsel to state his *Batson/Wheeler* objection. Counsel asserted: B. was the only Black male on the jury panels. He had had no contact with law enforcement. He had never served on a jury. He showed no express or implied biases. His one comment that "stuck out," about people drinking and driving in Elk Grove, appeared to be something he found more amusing than offensive; in any case, it did not suggest that he would find it

difficult to be fair or impartial. Therefore, the prosecutor's challenge was prima facie improper.

The trial court replied that though B.'s answers were amusing at times, the court "had some concern with regard to whether he was being direct," which suggested a potential basis for challenging him. Therefore, under the standard "whether or not there is a strong likelihood of exclusion based on group bias," no prima facie case had been made.

The prosecutor requested the opportunity to put his reasons for the challenge on the record. The trial court allowed him to do so.

The prosecutor explained:

"Your Honor, when the Court initially asked the group about aiding and abetting, um, all of them understood the Court. None of them had had an issue with it or raised any problems, except for [B.]. The first time you brought it up with the first group what [B.] said, at least on the surface it may seem benign, but I felt the way he said it, um, caused the People concern when he said, What if they were just there, it may be natural. Well, to me that caused me to believe that his instinct would be somewhat defense-oriented. And, in fact, I think that will be this Defendant's defense, that I'm just kind of there.

"I also, um, had a very difficult time reading [B.], and the more that I talked with him or others talked with him additional information came out that was not put on his questionnaire that I felt ought to have been or was rather serious.

"Most importantly was knowing someone who was arrested or convicted. All he put was that the people who appeared to drink and drive, um, but then he neglected until being questioned [*sic*]. That is all he put on this questionnaire. And then all of a sudden it came out that a very close friend of his shook a baby to death, and I found that somewhat unsettling that he either neglected to put something on his questionnaire about that or, um, that that slipped his mind.

"He also did not mention that not only do all of his friends that he knows drink and drive, then it became that they also, um, race. He mentioned something in passing that there is street racing going on and to me that's something, um, more serious than just drinking and driving. He seemed to be a part of the crowd that street raced or he knows street racers, which is a rather dangerous activity, especially these days.

"Um, that situation, from the People's perspective where we feel that we have a strong case -- I don't want a hung jury. Um, he is a loner type individual, he has never been married, he has no children. He's currently a student. Um, I don't really see any connection that he has, um, in relations, that he has stable long-term relationships. I just had a feeling that he didn't seem easy -- an easy type person that could relate and open up with other people. Those were the major reasons."

The trial court noted that out of the prosecutor's 12 peremptory challenges only three others had been to minority group members, and nondiscriminatory reasons for those were obvious.

Defense counsel declined further comment.

Analysis

A prosecutor's use of peremptory challenges to strike prospective jurors based on group bias violates a defendant's constitutional rights to be tried by a representative cross-section of the community (Cal. Const., art. I, § 16; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1104 (*Zambrano*); *Wheeler, supra*, 22 Cal.3d at pp. 276-277) and to equal protection (U.S. Const., 14th Amend.; *Johnson v. California* (2005) 545 U.S. 162, 168 [162 L.Ed.2d 129, 138] (*Johnson*); *Batson, supra*, 476 U.S. at pp. 94-96 [90 L.Ed.2d at pp. 86-89]).

A single discriminatory excusal is unconstitutional, even if other members of the group in question were seated. (*People v. Avila* (2006) 38 Cal.4th 491, 549.) However, the fact that a prosecutor has passed on other members of the racial or ethnic group to which a challenged juror belongs may show the prosecutor's good faith in exercising his peremptories. (*People v. Reynoso* (2003) 31 Cal.4th 903, 926.)

Before this case was tried, the United States Supreme Court had disapproved the "strong likelihood" standard used by the trial court to decide whether a prima facie case of *Batson/Wheeler* discrimination had been made, holding instead that the standard is whether there is "evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson, supra,* 545 U.S. at p. 170 [162 L.Ed.2d at p. 139].) Thus, the trial court's use of the disapproved standard was error.

Because the trial court used the wrong standard to find that defendant did not make a prima facie case, we do not rely on the court's finding. Instead, we consider the prosecutor's justifications for the challenge. (See *Zambrano, supra,* 41 Cal.4th at pp. 1104-1106.) In doing so, we determine first whether the prosecutor stated permissible race-neutral grounds for excusing B., then whether defendant has shown that they were mere excuses for discrimination. (*Ibid.*) We answer the first question "yes" and the second question "no."

The prosecutor's first stated reason for challenging B. was that, alone among the jurors, he asked a skeptical question about aiding and abetting ("What if [someone] just happen[s] to be there?"), a key concept for both sides, thus raising the possibility that B. might sympathize with the defense view of the case. This is a facially race-neutral, nondiscriminatory ground for challenging a juror.

Defendant asserts that the prosecutor misquoted B.'s question to make it argumentative ("What if they were just there, it may be natural") rather than a mere request for clarification. We are not persuaded. First, the prosecutor's paraphrase was not materially more argumentative than B.'s actual question ("What if they just happen to be there?"). Second, the prosecutor was entitled to suspect a pro-defense inclination from the fact that only B. asked such a question, which played into the most likely defense theory of the case.

The prosecutor also stressed the discrepancy between B.'s responses on his questionnaire and his responses during voir

dire, specifically his failure to mention on the questionnaire either the friend who shook the baby to death or the friends who street-raced while under the influence. Lack of candor or inadequate disclosure on a juror questionnaire is a facially race-neutral, nondiscriminatory reason for challenging a juror.

Defendant asserts that we cannot review this claim because B's questionnaire is unavailable. Not so. If the prosecutor had misstated the facts, defense counsel presumably would have said so. Counsel's silence tacitly admitted that the prosecutor was accurate about the absence of information on the questionnaire.

Defendant also asserts that so far as the prosecutor purported to rely on B.'s friendship with street racers, we must compare this association to those admitted by two seated jurors: one had a sister arrested for possession of methamphetamine, the other had a brother imprisoned for crimes including cocaine and marijuana sales and vehicle theft. This point is also unpersuasive.

We may perform comparative juror analysis for the first time on appeal. (*People v. Cruz* (2008) 44 Cal.4th 636, 658; *People v. Lenix* (2008) 44 Cal.4th 602, 622 (*Lenix*).) But the fact that the prosecutor did not have the opportunity to address defendant's point below complicates the task. (*Cruz, supra*, 44 Cal.4th at p. 660; *Lenix, supra*, 44 Cal.4th at pp. 623-624.) "Two panelists might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror,

on balance, more or less desirable. These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding." (*Lenix, supra,* at p. 624.)

Although we do not rely on the court's legal conclusion that no prima facie case had been made, we must give "significant deference" (*Lenix, supra,* 44 Cal.4th at p. 626) to the court's factual finding that B.'s answers raised "some concern with regard to whether or not he was being direct." Substantial evidence supports that finding, especially when B.'s answers are compared to his questionnaire and to the answers and conduct of the seated jurors.

The seated jurors immediately volunteered the information about their family members in response to direct questions, but B. casually dropped the "street racing" remark into an answer to a question about driving under the influence. Furthermore, one of the seated jurors revealed distress over her relative's misconduct and the dissension it had caused in her family, but according to defense counsel, B. seemed amused that people he knows "drink and drive and get caught." The prosecutor could reasonably have concluded that, unlike the seated jurors, B. took certain crimes lightly, at least if they involved his friends, and that this was an undesirable attitude for a juror.

The prosecutor's remaining reasons for challenging B. were more subjective: B. appeared to him to be difficult to "read[]," and his lack of openness and apparent lack of substantive relationships with others could make deliberations

difficult and increase the risk of a hung jury. These are also facially race-neutral, nondiscriminatory grounds for a peremptory challenge. Moreover, a prosecutor is entitled to rely on hunches and body language, among other subjective data, in assessing potential jurors, and such assessments necessarily defy scrutiny on the cold record.

Because defendant has failed to show that the prosecutor's reasons for challenging B. were pretexts for discrimination, the trial court's application of the wrong standard for alleged *Batson/Wheeler* error was harmless.

II.

Defendant contends the "in concert" finding on count three (the robbery of H.M.) must be reversed because there is insufficient evidence that he perpetrated or aided and abetted that robbery. He also contends the instruction given as to the in-concert allegation stated an illegal theory of conviction. We disagree on both points.

Background

After the People rested, defendant moved for acquittal (§ 1118.1) on count three, the robbery of H.M., arguing that no evidence showed defendant aided and abetted that robbery: it was not contemplated in advance, defendant never went into the house, and he did not even know H.M. was there. The prosecutor replied first that because (1) defendant helped to plan a home invasion robbery and it was obvious that others might be at the house when the robbery took place, and (2) he aided and abetted those who robbed H.M., the jury could find him guilty on

count three as an aider and abettor. Later, however, the prosecutor said: "If it's not direct aiding and abetting then that would be a natural and probable consequence."

The trial court denied the motion for acquittal on count three and stated that it would instruct the jury on natural and probable consequences as to that count.

As noted above, counsel squarely disputed this issue in closing argument.

The trial court instructed the jury with CALCRIM No. 402 as follows:

"The defendant is charged in Count [two] with the [r]obbery of Larry Elliott, Jr.[,] and in Count [three] with the [r]obbery of H[.]M[.]

"You must first decide whether the defendant is guilty of [r]obbery as alleged in Count [two]. If you find the defendant is guilty of this crime, you must then decide whether he is guilty of [r]obbery as alleged in Count [three].

"Under certain circumstances, a person who is guilty of one crime may also be guilty of other crimes that were committed at the same time.

"To prove that the defendant is guilty of [r]obbery as alleged in Count [three], the People must prove that:

"1. The defendant is guilty of [r]obbery as alleged in Count [two];

"2. During the commission of the [r]obbery alleged in Count [two], the crime of [r]obbery as alleged in Count [three] was committed;

"AND

"3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of [r]obbery as alleged in Count [three] was a natural and probable consequence of the commission of the [r]obbery as alleged in Count [two].

"A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the [r]obbery alleged in Count [three] was committed for a reason independent of the common plan to commit [r]obbery, then the commission of [r]obbery as alleged in Count [three] was not a natural and probable consequence of the [r]obbery alleged in Count [two].

"To decide whether [the] crime of [r]obbery was committed, please refer to the separate instructions that I have given you on that crime."[8]

The trial court also gave CALCRIM Nos. 1600 (robbery), 1601 (robbery in concert), 1602 (degrees of robbery), and 1603 (aider and abettor liability for robbery).

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[8] The defense originally proposed this instruction, though not specifying which counts it should cover.

Analysis

Sufficiency of the evidence

Defendant contends there was insufficient evidence that he either perpetrated or aided and abetted the robbery charged in count three, even under a "natural and probable consequence[s]" theory; therefore, the finding that he committed that robbery in concert with others must be reversed.[9] We disagree. Substantial evidence supported his conviction on count three, including the "in concert" finding, because it was a natural and probable consequence of the home invasion robbery he helped to plan and execute.

"'"The general rule is well settled that where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. . . . *Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its natural and probable consequences, even though it was not intended as a part of the original design or common plan.*"'" (*People v. Prettyman* (1996) 14 Cal.4th 248, 260-261 (*Prettyman*), italics added by *Prettyman*.)

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[9] It is unclear why defendant argues only for a reversal of the "in concert" finding on count three, rather than for a reversal of his conviction on that count. If there were no substantial evidence that he perpetrated or aided and abetted the robbery of H.M. on any theory, his conviction on count three obviously could not stand.

"In *People v. Croy* [1985] 41 Cal.3d 1 [(*Croy*)], we set forth the principles of the 'natural and probable consequences' doctrine as applied to aiders and abettors: '[An aider and abettor] is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets. . . . [¶] It follows that a defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator. It is the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense, which . . . must be found by the jury.' (*Id.* at p. 12, fn. 5.) Thus, under *Croy*, a defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the 'natural and probable consequence' of the target crime." (*Prettyman, supra*, 14 Cal.4th at p. 261.)

Defendant does not dispute that the jury found him a full participant in the original conspiracy (thus rejecting his story that he agreed only to scout out Elliott's premises, and even that only under coercion). It was reasonably foreseeable that if Elliott did not tell the conspirators where all his drugs,

money, and firearms were, or if they did not find all they hoped to find in the attached garage, one or more of them would enter the house to continue the search. As was the case here, when in the garage the defendants' demands for money were unsuccessful, they entered the house. It was also reasonably foreseeable that if anyone (i.e., H.M.) was in the house, the conspirators would force or frighten her into divulging the whereabouts of Elliott's hidden cash or contraband--or, failing that, would simply take her property by force or fear.

Because a reasonable person in defendant's position would have foreseen these likely consequences of the original conspiracy, the robbery of H.M. was a natural and probable consequence of that conspiracy as a matter of law. Whether defendant knew that H.M. was there or that his coconspirators were robbing her, or whether he intended that result, is immaterial to his liability on count three. By aiding and abetting the robbery of Elliott, defendant also aided and abetted any crime which was the natural and probable consequence of that robbery. (*Prettyman, supra*, 14 Cal.4th at p. 261; *Croy, supra,* 41 Cal.3d at p. 12, fn. 5.)[10]

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[10] Defendant states correctly that natural and probable consequences liability will lie only if a defendant was aware of the perpetrator's unlawful purpose. But the "unlawful purpose" the defendant must be aware of is the perpetrator's intent to commit the *target* crime (here, the original robbery), not the *nontarget* crime which is its natural and probable consequence.

The "In Concert" Instruction

Defendant separately claims that CALCRIM No. 1601, the "robbery in concert" instruction, as given here, created an illegal theory of conviction. This claim lacks merit.

The trial court instructed the jury as relevant:

"It is further alleged in Counts [two] & [three] that the [d]efendant committed robbery by acting in concert.

"To prove that the defendant is guilty of this allegation, the People must prove that:

"1. The defendant personally committed or aided and abetted a robbery;

"2. When he did so, the defendant voluntarily acted with two or more other people who also committed or aided and abetted the commission of the robbery;

"AND

"3. The robbery was committed in an inhabited dwelling. [¶] . . . [¶]

"To decide whether the defendant committed robbery, please refer to the separate instructions that I have given you on that crime. To decide whether the defendant aided and abetted robbery, please refer to the separate instructions that I have given you on aiding and abetting. You must apply those instructions when you decide whether the People have proved robbery in concert.

"To prove the crime of robbery in concert, the People do not have to prove a prearranged plan or scheme to commit robbery."

Defendant asserts that this instruction could have led the jury erroneously to find he acted in concert as to count three only because he aided and abetted count two. But since his argument depends on the false premise that the jury could not reasonably have found he aided and abetted count three, we need not consider it further.

Defendant has shown no grounds for reversal on this issue.

III.

Defendant contends that the crime prevention fee of $20 imposed by the trial court under section 1202.5 is unauthorized because the statute permits only a $10 fee in any case. The People agree.[11]

The People assert, however, that the court failed to impose the following assessments and surcharges which are required under section 1202.5: a $10 penalty assessment under section 1464, subdivision (a); a $7 penalty assessment under Government Code section 76000, subdivision (a)(1); a $2 state surcharge under section 1465.7, subdivision (a); and a $3 state court construction penalty under Government Code section 70372, subdivision (a)(1). Thus, according to the People, the

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[11] Section 1202.5, subdivision (a) states as relevant: "In any case in which a defendant is convicted of any of the offenses enumerated in Section 211 . . . , the court shall order the defendant to pay a fine of ten dollars ($10) in addition to any other penalty or fine imposed." Such fine "can be imposed only once in a case, rather than for each conviction in a case." (*People v. Crittle* (2007) 154 Cal.App.4th 368, 369-370.) Thus, although defendant was convicted of two counts of violating section 211, only one fine under section 1202.5 may be imposed.

total amount owed under this heading is actually $32. But section 1202.5 on its face does not cross-reference these other provisions, and the People fail to cite authority for their assertion that these assessments and surcharges must be added to any fine imposed under section 1202.5.

In his reply brief, defendant concedes that "the base fine is subject to penalties and surcharges," but does not concede that the People's total is correct or suggest any other.

Because the fine imposed by the trial court is unauthorized and the parties' briefing has not helped us to determine the correct amount, we shall remand the matter with directions to the trial court to calculate the fines and penalties to be imposed pursuant to section 1202.5, and to correct the abstract of judgment so that it reflects the components of the fine. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.)

IV.

Lastly, defendant contends that the abstract of judgment should be corrected to show that in each of the trailing cases (Nos. 03F04807 & 04F07097), defendant was convicted of simple possession of cocaine base (Health & Saf. Code, § 11350, subd. (a)), rather than possession for sale of marijuana (case No. 03F04807) and possession for sale of cocaine base (case No. 04F07097). The People concede the point. We accept the People's concession.

On remand, the trial court is directed to correct the abstract in this respect also.

DISPOSITION

The matter is remanded to the trial court with directions to recalculate the total amount due under section 1202.5 and any associated provisions, to correct the abstract of judgment as specified in parts III and IV of the Discussion, and to furnish a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

CANTIL-SAKAUYE, J.

We concur:

SIMS, Acting P. J.

NICHOLSON, J.